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No. 275

In the

Supreme Court of the United States

OCTOBER TERM, 1969

ERNEST WERNER LOOS,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, ERNEST WERNER LOOS, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, confirming the decision and order of the Special Inquiry Officer of the Respondent, as confirmed in administrative review by the Board of Immigration Appeals, and denying the petition for review of the order of deportation entered by the Immigration and Naturalization Service, Respondent.

JUDGMENT AND OPINION OF THE COURT BELOW

The decision of the Special Inquiry Officer of the Immigration and Naturalization Service ordering deportation, is printed in the Appendix "A."

The decision of the Board of Immigration Appeals, confirming the decision of the Special Inquiry Officer, is printed in the Appendix "B."

The opinion of the Court of Appeals has been officially reported at 407 F. (2d) 651, and will be found in Appendix "C."

The order of the Court of Appeals denying the petition for re-hearing will be found in Appendix "D."

JURISDICTION

The order of the Court of Appeals sought to be reviewed was dated and entered on February 19, 1969. A timely petition for re-hearing was denied by said court on March 24, 1969. The mandate of the Court of Appeals was stayed for ninety (90) days from the date of the denial of the petition for re-hearing, pending the filing of a petition in this court for a Writ of Certiorari.

Jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner was in fact granted exemption from military service as a direct result of his application for exemption on the grounds of alienage.

2. Whether an alien who has not been "effectively relieved" from military service on the grounds of claimed exemption is ineligible for citizenship.

3. Whether the petitioner was misinformed by a member of the draft board, so that his claim for exemption should not bar him from eligibility for naturalization.

4. Whether a deportation order should be based upon evidence which is not clear, unequivocal and convincing.

5. Whether the deportation proceedings should be terminated to permit the petitioner to file a petition for naturalization.

6. Whether an alien who entered the United States by misrepresentation, innocent or otherwise, who has a United States citizen wife and a United States citizen child, is relieved from deportation.

7. Whether a decision of a Court of Appeals which is, on its face, based upon a misapprehension of the facts, should be permitted to stand, to result in the deportation of a husband of a United States citizen, who is also the father of another United States citizen.

8. Whether the Circuit which holds that a party who claimed exemption from military service on the ground of alienage was not ineligible for citizenship because he was later called for a physical examination is correct, or whether the decision of another Circuit holding directly the opposite, is correct.

9. Whether the Circuit which holds that non-immigrants are not entitled to the benefits of Section 241(f) of the Immigration and Nationality Act, (8 U.S.C. 1251(f)) is correct, or whether the other Circuit, which holds directly the opposite, is correct.

STATUTES INVOLVED

The Statutes involved are:

Sections 212(a)(19) and (22) of the Immigration and Nationality Act, 8 U.S.C. 1182 (a)(19) and (22), which provides:

> "Except as otherwise provided in this Act the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> • • •
>
> "(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by wilfully misrepresenting a material fact;
>
> • • •

"(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants;"

Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1):

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

"(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f):

"The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence."

Section 315(a) of the Immigration and Nationality Act, 8 U.S.C. 1426(a):

"Notwithstanding the provisions of section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps

of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States."

Section 318 of the Immigration and Nationality Act, 8 U.S.C. 1429, which reads in part:

"Notwithstanding the provisions of section 405(b), and except as provided in section 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act".

STATEMENT OF THE CASE

The petitioner is an alien, a native and citizen of Argentina, who entered the United States for permanent residence at New York on or about September 14, 1959. He had previously been admitted to the United States for permanent residence on August 3, 1940, but on July 30, 1947 he left the United States and went to Switzerland where he lived until his second and last entry for permanent residence in 1959.

He is married to a naturalized United States citizen, and has a United States citizen son, who was born in Orange, New Jersey on April 10, 1942. Although he had a responsible position with a good income, his United States citizen son wished to come to the United States to study engineering, which was the reason for petitioner's leaving his lucrative and responsible position and returning to the United States.

The petitioner suffered from tuberculosis of the spine when he was only seventeen years old and was treated for a number of years, and his medical examination at the present still shows that he has a serious condition of his spine, as a result of his earlier tuberculosis (Record, pages 164-167, 178, 186 and 187).

When petitioner sought advice regarding the possibility of his being drafted despite his medical history, he was advised by a Dr. Wolf (a member of the draft board in California, to which his New Jersey board had referred him) that he might still be drafted despite his condition (Record, pages 62, 157, 186-187). Dr. Wolf told him that the only way that he could be certain that he would not be drafted would be for him to apply for exemption under classification 4-C, a classification for a neutral alien or alien who is a citizen of a country with which the United States has a treaty exempting nationals of either country from military service in the other country. Argentina is a country with which we have such a treaty. Argentina was also a neutral country in World War II until March 27, 1945 when it became a co-belligerent upon its declaration of war upon the Axis powers (Record, page 10). (Also see Encyclopedia Brittanica, 1958 Edition, Volume 2, page 326).

Thereupon, upon the advice of Dr. Wolf, a member of that draft board, which currently was handling his matter, on August 28, 1943, the petitioner signed an application for relief from military service.

However, he was not placed in classification 4-C until May 20, 1944. Although the Selective Service record is rather muddled, there being a conflict between the records of the Board (Exhibit 5, Record page 119 et seq.) and the records of the New Jersey State Headquarters of

Selective Service (Exhibit #7, Record page 163), it appears that despite the application, petitioner was given a physical examination which resulted in a classification of 4-F (physically unfit), and he also was asked to file an Occupational Classification Affidavit, which he did on May 11, 1944.

Originally, he had been placed in a 4-C classification, without any request on his part, by the action of the draft board itself, on their own initiative, on March 14, 1941 (Record, page 119).

When the petitioner filed an application for naturalization, he was advised that since he had claimed exemption from the draft on grounds of alienage in World War II that he was ineligible for citizenship and therefore should have been excluded from the United States in 1959 under *Section 212(a) (22) of the Immigration and Nationality Act (8 U.S.C. 1182 (a) (22))*, and, therefore was deportable under *Section 241 (a)(1) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(1)*, which provides for the deportation of aliens who were within one of the classes of aliens excludable by law, existing at the time of entry. He was advised to withdraw his application for naturalization, which he did, and deportation proceedings were commenced against him. After the initial hearing before the Special Inquiry Officer of the respondent, the Special Inquiry Officer ordered the proceedings terminated on December 28, 1965, to permit the petitioner to apply for naturalization.

The Board of Immigration Appeals reversed the Special Inquiry Officer on April 26, 1966 and remanded the case for further hearing. Thereupon, the Special Inquiry Officer held further hearings and on August 3, 1966, he granted voluntary departure to the petitioner with an

order of deportation to be entered in the event that the petitioner did not leave within the time set by the respondent. Timely appeal was taken to the Board of Immigration Appeals and on October 28, 1966 it affirmed the decision of the Special Inquiry Officer granting voluntary departure with an order of deportation if petitioner did not leave the United States.

Thereafter, on December 7, 1966 the petitioner was ordered deported and an appeal to the Court of Appeals for the Seventh Circuit was taken.

While it was pending, the United States Attorney's Office suggested that perhaps the matter should be remanded to the respondent for reconsideration of the case in the light of the decision of *Woodby* v. *Immigration and Naturalization Service and Sherman* v. *Immigration and Naturalization Service*, 385 U.S. 276, 87 S. Ct. Rep. 483 (December 12, 1966). The court thereupon remanded the case to the respondent on May 22, 1967 and further argument was had before the Board of Immigration Appeals of the respondent. That body, on September 27, 1967, granted the present petitioner voluntary departure with an alternative order of deportation if the petitioner failed to depart when and as required. Another petition for review was thereupon filed with the Court of Appeals on November 9, 1967, but was denied on February 19, 1969 and a petition for rehearing was denied on March 24, 1969.

The jurisdiction of the Court of Appeals was originally invoked under *Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1106(a)*, which provides for a direct review in the Courts of Appeals from all final orders of deportation.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

First of all, let us discuss the proposition that the present law, *Section 315(a) of the Immigration and Nationality Act, (8 U.S.C. 1426(a))* requires not only that an application for exemption shall have been filed, but also that such exemption shall have been granted pursuant to such application. Under the previous law, the mere filing of an application for such relief was sufficient to work a disqualification from citizenship, but this is no longer the law. See *Application of Mirzoeff*, 253 Fed. 2d 671 (1958), which so held. In that case, the party had filed an application for relief from military service as a neutral alien, but before his application was processed his country became a co-belligerent. He never in fact served, since he had a limited service classification following his physical examination.

The present petitioner was originally classified 4-C by the action of the draft board itself, on its own initiative on March 14, 1941 (Record, page 119). Thereafter, in 1943, he spoke to Dr. Wolf, a member of the draft board in California, where he was then living. He had been referred to the California draft board by his New Jersey board, where he lived when he first registered. He was advised by Dr. Wolf that his physical condition would not necessarily exempt him, and that the only way in which he would be certain that he would not be drafted was to file a request for exemption as a treaty alien; he filed such request in August, 1943.

However, it is obvious that such request was ignored, because subsequent thereto he was in fact given a physical examination, and was also sent an Occupational Classification Affidavit, which he filed on May 11, 1944. Atten-

tion is called to the *Federal Register* for 1943, dated January 5, 1943, at page 77, under Title 32, Chapter VI, page 623. There it will be found that registrants who are in class 4-C shall not be given a physical examination, so that it would appear that his request for exemption was ignored.

It was not until May 20, 1944 that he was reclassified in class 4-C, his original classification.

As a matter of fact, he was again thereafter reclassified on April 21, 1945 in class 4-A. Thereafter again on April 27, 1945, he was "continued in 4-C", although Argentina became a co-belligerent on March 27, 1945, when it declared war on the Axis powers, so that it appeared that the Board was still acting on its own initiative and not even following the law, for he would no longer be entitled to such classification, as a national of a co-belligerent. See the *Board of Immigration Appeals Decision,* page 10 of the Record, and *Encyclopedia Brittanica,* 1958 Edition, Volume 2, page 326.

In support of the proposition that petitioner is not ineligible for citizenship because he was not "effectively relieved", we should like to cite the case of *In Re Petition of Fabbri,* 254 F. Supp. 858 (1966). In that case, *Fabbri,* who was a petitioner for naturalization, executed the form requesting exemption from service on the ground of alienage on two separate occasions.

Selective Service records indicated that he was classified as I-A, IV-C, IV-F and IV-A, although the chronological order of these classifications was not clear from the records. There was no question whatsoever that the petitioner did not fully understand the consequences of the request for exemption as to his ineligibility for citizenship.

However, the Court granted him naturalization and states, at Page 861:

> "We conclude that on this record the petitioner is not ineligible for citizenship as we do not find that he was 'effectively relieved' on the ground of claim of exemption. The record supports a finding that his IV-C classification was nullified and the alien examined for induction and classified IV-F and later IV-A; accordingly the petition is granted".

Thus we have a case which is on all fours with the present case. LOOS, the petitioner in this case, was placed in IV-C but he was given a physical examination and placed in IV-F, and in 1945 he was placed in IV-A. We fail to perceive any distinction between the *Fabbri* case and the present case.

Also in the case of *United States* v. *Bazan,* 228 F. 2d 455, the applicant there filed a claim for exemption in November of 1942. He later tried to withdraw this application but the draft board ruled that he could not do so. The Court ruled that his request for withdrawal of his exemption application operated to except him from the statutory bar to citizenship and he was granted citizenship.

The next proposition which is urged is that the provisions of *Section 315 of the Immigration and Nationality Act* do not apply to a petitioner for naturalization who was mistaken as to his rights and particularly to one who was misled by those whose duty it was to properly advise him.

Dr. Wolf, a member of the draft board which was exercising control over petitioner at the time, mistakenly told the petitioner that he could still be drafted despite his back condition, and that the only way in which he

could avoid the possibility of injury to his tubercular spine, would be to ask for exemption on the grounds of alienage. This was wrong, as subsequent events proved that his physical examination resulted in a classification of 4-F. (Record, page 163).

The leading case in this field is the case of *Moser* v. *United States,* 341 U.S. 41; 71 S. Ct. 553; 95 L. Ed. 739 (1951). In this keystone case *Moser* had been incorrectly advised by the Swiss Legation that since he was claiming exemption as a treaty alien that he would not lose his eligibility for United States citizenship. He thereupon signed the application and later was held not to have lost his right to become a citizen. The court said:

> "In fact because of the misleading circumstances in this case, he never had an opportunity to make an intelligent election between diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the case, we find that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness. To hold otherwise would be to entrap petitioner."

Moser was granted citizenship.

In a more recent case, in the case of *In Re Bouchage's Petition,* 177 F. Supp. 887 (1959), the petitioner there signed the application for exemption which specifically stated that the person who signed it understands that it would debar him from becoming a citizen of the United States. The petitioner there spoke with a draft board member and told him that he wished to serve with the Free French Forces. The draft board member told the petitioner that the only way he can be permitted to serve with the Free French Forces was to sign the form requesting exemption on the grounds of alienage, and he did so. No representation was made to him that he would

not lose his right to become a citizen, only that the only way he could serve with the Free French was to sign the form.

It was held that *Bouchage* was not debarred from citizenship because he "never had the opportunity to make an intelligent election", as in the *Moser* case. It also held that there was "no intelligent waiver of his privilege of citizenship". The information was given on which he relied, and on which he was entitled to rely.

Another case in which a person who signed the application and was given a 4-C classification, but who was later granted citizenship, was the *Petition of Meng Chung Yang,* 171 F. Supp. 989. The petitioner there was admitted on a student visa and he was therefore entitled to a 4-C classification under the regulations then in force. However, he was asked to and did sign Form 130, the application for relief, which form stated that he would be debarred from citizenship.

However, it was held that he was entitled to his 4-C classification because of his student status and he was therefore under no legal duty to execute the form in order to obtain the relief and his petition for naturalization was granted.

In another important case on this subject, *Petition of Berini,* 112 F. Supp. 837, the petitioner there was also advised by the Swiss Legation that if he signed the revised form, he would still be entitled to apply for American citizenship. This revised form contained the statement below the signature, advising that the application for exemption would debar him from becoming a citizen.

However, the Court held that *Berini* had been misled by the Swiss Legation and that he did not lose his right

to become a citizen. The decision points out that *Berini* was intelligent and well educated, but that he was still entitled to be naturalized because he did not make an intelligent choice because of having been misled.

The *Berini* case specifically stated that the doctrine of the *Moser* case still applied after the passage of the Immigration and Nationality Act of 1952. The case also referred to Board of Immigrations Appeals Decisions in the matter of the *Petitions of Hans Rudolph Mauch*, A-2202545 and of *Werner Fritz Groebli*, A-2202546. These decisions held that even after the enactment of the 1952 amendment, the *Moser* case would be held determinative. Accordingly, the applicants were not found ineligible for citizenship.

In the *Petition of Planas*, 152 F. Supp. 456 (1957), *Planas* was naturalized although he had signed the claim for exemption which stated, "I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States". The petitioner had objected to this form because of this language and expressed his preference for a revised form which he had seen but which was apparently not available at the office of the Board.

Planas testified that he had discussed his problem with the representatives of the draft board and thereafter executed the claim for exemption only after their assurance that the form "made no difference". He did not recall with any degree of certainty the substance of the advice given him, but testified that he was led to believe that he might execute the said form and at the same time preserve his right to later apply for citizenship. The Court held that he was justified in relying on the representations made to him by the draft board.

The Court in the Planas case stated, at Page 459, "The circumstances surrounding the present petitioner's application for exemption from military service were misleading and he was thereby denied the opportunity of making the 'intelligent waiver' which the court in the *Moser* case held 'is required by elementary fairness' ".

The Court also stated, "The failure of the present petitioner to consult the 'highest authorities' is not determinative because there is no suggestion in the opinion of the Court in the *Moser* case that such action is required".

It is respectfully submitted that the present petitioner comes squarely within the doctrine of the *Moser* case. He was misinformed by the draft board having jurisdiction over him, upon whose advice he was entitled to rely. The *Moser* case did not require him to resort to "the highest authority".

The *Berini* case was a case where the petitioner, although well educated and intelligent, was still entitled to be naturalized because he had been misled not by the United States Government official, but by the Swiss Legation, as were the cases in the *Petitions of Mauch and Groebli,* as cited by the Board of Immigration Appeals A-2202545 and A-2202546.

The present petitioner also comes within the *Planas* case, 152 F. Supp. 456 where the petitioner also was misled by the draft board and was permitted to be naturalized.

A recent decision by the Supreme Court of the United States, on December 13, 1966 was a double case entitled *Woodby* v. *I&NS and Sherman* v. *I&NS,* 87 S. Ct., Rep. 483, 35 L.W. 4053, which held that the standard of proof

required for a deportation case was that of "clear, unequivocal and convincing evidence".

What type of evidence do we have here? We have a discrepancy between the draft board file, Exhibit 5 (Record, page 119 et seq), which shows five different classifications for the petitioner, and the letter from the New Jersey State Headquarters of the Selective Service System, Exhibit 7 (Record, page 163) which shows four different classifications. In Exhibit 7, a classification of 4-F is shown which is not in Exhibit 5, and in Exhibit 5, classifications of 3-B and 2-A are shown which are not shown in Exhibit 7.

Exhibit 5 also shows that despite the request for exemption which was filed in August of 1943, petitioner was not reclassified into 4-C until May 20, 1944, so that it appears that the classification into 4-C was not the result of the application which was ignored for about nine months, but that it was rather the draft board reclassifying him into the original 4-C into which he had been placed by the draft board's own action in March, 1941.

Further credence is given to this conclusion by the fact that despite the provisions of the Federal Register for the year 1943 at page 77, which stated that a person who was in 4-C should not be given a physical examination, this registrant (the petitioner) was in fact given a physical examination which resulted in his being in 4-F. Also during this period, he was sent an Occupational Classification Affidavit, or questionnaire, which he filed on May 11, 1944. This, too, was ignored by the draft board, which reclassified him nine days later into 4-C.

The confusion in this particular draft board is also evident by the fact that they took him out of 4-C on their

own initiative on April 21, 1945 and placed him in class 4-A, and then *six* days later on April 27, 1945, marked his record "continued in 4-C". He was certainly not entitled to this latter classification on April 27, 1945 because Argentina was no longer neutral, but became a co-belligerent on March 27, 1945 when it declared war on the Axis powers. See *Board of Immigration Appeals Decision* on page 10 of the Record and *Encyclopedia Brittanica,* 1958 Edition, Volume 2, page 326.

Upon such a muddled record, is it fair, or legal, or proper, to base a deportation charge against the petitioner, who has a United States citizen wife who is dependent upon him for support, and a United States citizen child for whose sake he returned to the United States?

Petitioner had an excellent position in the Swiss Pharmaceutical Industry, but he returned to the United States so that his son could study mechanical engineering in his native land, and his son is presently an engineer in the rocketry field. As a matter of fact, the position which the petitioner has now, is not as lucrative a position as that which he had in Switzerland, although it is an extremely responsible one, since it takes a knowledge of several languages and familiarity with the technical language of pharmacy and medicine. The record is replete with evidence that the petitioner did not realize that he might be excludable or ineligible for naturalization when he returned to the United States, or he would not have left Switzerland.

Certainly, this uncertain evidence cannot be classified as "clear, unequivocal and convincing evidence" as required by the Supreme Court of the United States.

On Page 3 of the Government's brief filed January 19, 1966 (Page 88 of the Record), it is stated, "* * * there is

a question of fact whether respondent had received a military exemption * * *". It is evident therefore that even the Government admits that there is no "clear, unequivocal and convincing evidence" of the granting of the exemption as a result of the request of the petitioner.

The filing of the request for exemption was not only ignored by the draft board, but unnecessary, since he was entitled to class 4-F, and as per the decision in Petition of Meng Chung Yang, he was under no legal duty to execute the form.

Next, we come to the proposition that deportation proceedings can and should be terminated so that the petitioner may file a petition for naturalization. I call attention to the case of *Pignatello* v. *Attorney General,* 350 Fed. 2d 715 (1965). That case held that the deportation proceedings should be terminated to allow the petitioner to proceed toward naturalization, if the petitioner made a preliminary showing that the statute does not preclude him from establishing eligibility for naturalization. It is believed that this petitioner should have an opportunity to present his case, with all its equitable factors, for the decision of a naturalization court.

Another case so holding was the case of *United States* v. *Schwarz,* 82 F. Supp. 933 (1949). This case was favorably cited in the *Matter of LaRochelle,* Int. Dec. 1538 of the Board of Immigration Appeals, which held "further exploration of the request for termination of proceedings to enable Respondent to apply for naturalization is indicated by the existence of the favorable factors, the lack of alternative relief, and the possibility that Respondent is not ineligible for naturalization."

All of the factors mentioned in the previous paragraph are present in the instant case.

The *Immigration and Nationality Act, Section 318 (8 U.S.C. 1429)* provides that no petition for naturalization may be heard if there is outstanding either a final finding of deportability, or if there is pending a deportation proceeding against such petitioner. Nevertheless, the Attorney General possesses the inherent discretionary power to terminate deportation proceedings to permit the alien to adjust his status through naturalization. See *Matter of B.....*, 6 I&N Dec. 713, and *Matter of M.....*, 5 I&N Dec. 622. This was originally done in this case by the Special Inquiry Officer, but the Board of Immigration Appeals reversed and sent the matter back to the Special Inquiry Officer who thereupon ordered the petitioner to be deported if he did not leave voluntarily.

Another case in which deportation proceedings were terminated so that the party could proceed toward naturalization was *Matter of Hroncich,* Int. Dec. 1473.

Section 241(f) of the Immigration and Nationality Act (8 U.S.C. 1251(f), states:

> "(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence."

If the petitioner is in fact an alien ineligible to citizenship as urged by the Government, then when the petitioner applied for his visa before the United States Consul in Zurich, Switzerland on May 13, 1959, he procured his visa by fraud or misrepresentation. Attention is called

to the Record, page 224, which is a photocopy of the page of the visa application and the visa in question. At question 38 it states:

> "I have had the following excludable classes explained to me and state that I am not, except as hereinafter noted, a member of any one of the following classes of individuals excluded from the United States under the Immigration and Nationality Act * * * (17) Persons ineligible to citizenship of the United States,* * *."

We do not urge that the present petitioner is an alien ineligible to citizenship. We hotly contest this fact. However, the only way in which he would be deportable would be on the grounds that he is an alien ineligible to citizenship because of a claim for exemption from military service, which actually served to relieve him from military service, which would result in his being a person ineligible to citizenship on that ground. He would, therefore, be excludable from the United States under *Section 212(a)(22) of the Immigration & Nationality Act* (8 U.S.C. 1182(a)(22), and therefore deportable under *Section 241(a)(1)* (8 U.S.C. 1251(a)(1), because he would have been one of the classes of aliens excludable at entry.

Therefore, even if we were to concede that the Government is correct, that the petitioner, being an alien ineligible to citizenship, was excludable at entry and therefore presently deportable, then it must be conceded that his representation at the time he obtained the visa was either a fraud or a misrepresentation, or both. He would therefore come clearly within the ambit of the prohibition against deportation of the spouse of an American citizen and the parent of an American citizen found in *Section 241(f)* (8 U.S.C. 1251(f).

In connection therewith, the attention of this Court is directed to the case of *Immigration and Naturalization Service* v. *Errico* and *Scott* v. *Immigration and Naturalization Service,* decided December 12, 1966, 385 U.S. 214, 87 S. Ct. Rep. 473.

In that case, the Supreme Court of the United States held that two persons who had entered the United States by fraud or misrepresentation should not be deported because of their relationship to a United States citizen child, because of *Section 241(f) of the Immigration and Nationality Act.* The case further held that the ban against deportation for persons having the proper relationship to a United States citizen or a permanent resident alien also applies to the deportation of such persons under other sections of the Act.

I should like to quote from the decision in discussing the 1957 Amendment to the Immigration and Nationality Act, which added *Section 241(f)*:

> "The intent of the Act is plainly to give exceptions to the rigorous provisions of the 1952 Act for the purpose of keeping family units together. Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations *or even the many restrictive sections that are designated to keep undesirable or harmful aliens out of the country.*" (emphasis ours)

DR. LOOS, the petitioner herein, is the husband of a United States citizen, and the parent of another United States citizen, the latter a native born citizen. Although the charge of deportability under *Section 212(a)(19),* the Fraud Section, was not laid against the petitioner, the fact remains that if the petitioner is deportable be-

cause he is ineligible for citizenship, that, in fact, a misrepresentation would have been made by him when he applied for a visa at the time of his last entry for permanent residence, and answered the question on the visa application relating to his not being a member of a class ineligible for a visa because of his having claimed exemption from the draft on the grounds of alienage.

Further quoting from the *Errico* and *Scott* decision, we find that the court stated as follows:

> "Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien. As this Court has held, even where a punitive section is being construed:
>
> > 'We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. *Delgadillo* v. *Carmichael,* 332 U.S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.' *Fong Haw Tan* v. *Phelan,* 333 U.S. 6, 10. See also *Barber* v. *Gonzales,* 347 U.S. 637, 642-643.
>
> "The 1957 Act was not a punitive statute, and Sec. 7 of that Act, now codified as Sec. 241(f), in particular was designed to accomplish a humanitarian result. We conclude that to give meaning to the statute in the *light* of its humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens, the conflict between the circuits must be resolved in favor of the aliens, and that the *Errico* decision must be affirmed and the *Scott* decision reversed."

The decision of the Board of Immigration Appeals on September 27, 1967, although adverse, is sympathetic. It is stated on Page 4 of that decision:

> "We have considered Respondent's good faith, his good record in the United States, his family ties and his needed skill, but we find no administrative relief which can permit him to remain legally."

A recent interim decision of the Board of Immigration Appeals, Int. Dec. #1711, rendered on March 17, 1967 entitled *Matter of Manchisi,* is called to this Court's attention.

There the Board held:

> "Respondent, whose deportability is established within the purview of section 241(c) of the Immigration and Nationality Act, as amended, having entered the United States in 1962 with a nonquota immigrant visa obtained as the beneficiary of an approved visa petition based on a marriage found later to have been contracted to evade the immigration laws, is not precluded from establishing he is "otherwise admissible" for the purpose of a waiver of the grounds of deportation pursuant to section 241(f) of the Act, as amended, notwithstanding respondent, but for the marriage, would have been chargeable at the time of entry in 1962 to the nonpreference portion of the quota for Italy which was then unavailable because oversubscribed. (*Matter of Frisone,* 10-117, overruled.)

Manchisi's original marriage was a fraudulent one, entered into to evade the immigration laws, but his second marriage, a marriage in good faith was to an American citizen, and he had an American child born of his second, bonafide marriage. Deportation proceedings were terminated because of his relationship to the two United States citizens.

It was also contended by the Government that LOOS was not entitled to the benefits of *Section 241(f)* because he was "not otherwise admissible". However, in this connection we cite a decision of the Board of Immigration Appeals, *In The Matter of Cordero-Santana,* Int. Dec. 1694, which is a precedent decision of that administrative body. It was held that although the alien there was deportable not only for fraud but also on other charges, that the alien was not precluded from establishing that he was "otherwise admissible" for the purposes of a waiver of the grounds of deportation under *Section 241(f) of the Immigration and Nationality Act,* since any ground of deportation (regardless of the section of statute under which brought) which results directly from the visa fraud or misrepresentation is encompassed within the purview of *Section 241(f)* of the Act, provided the alien has the requisite relationship to a United States citizen or resident alien.

Some of the decisions have stated, quite properly, that it is difficult to conceive of an alien misrepresenting a fact other than one which would make him "otherwise inadmissible". A misrepresentation of an immaterial fact would hardly be necessary, nor would such misrepresentation make the alien deportable as one who gained entry by fraud or misrepresentation.

It was argued by the Government that the petitioner was not guilty of fraud because he did not know that he was ineligible for citizenship. This would create the anomalous situation that where a party was innocent of fraud, that he could not receive the benefits of *Section 241(f) of the Immigration and Nationality Act,* but if he were guilty he could receive the benefits of that section. This argument was effectively laid to rest by the decision of *In The Matter of the Petition for Natural-*

ization of Yuen Lan Hom, found at 289 F. Supp. 204 (1968), in which a person who innocently misrepresented in coming to the United States was held entitled to the benefit of *Section 241(f).* The court said, among other things:

> "While the point would have been apparent anyhow the cited decision (referring to the *Errico-Scott* decision) made explicit and unquestionable that the statutory purpose was to keep family units of citizens and non-citizens together. * * * It was not written to encourage or grant a reward for fraud".

Further in the decision the Court said:

> "For it is familiar, in law and elsewhere, that a misrepresentation may be unintentional as well as fraudulent. And there is no strain in so reading the word when every pertinent consideration bespeaks the propriety of a liberal construction."

The Government had also urged in its brief below in the present case, that certain cases which it cited showed that *Section 241(f)* did not apply in this case. But the only cases which the Government could cite in support of that are cases relating to two persons who entered the United States as *non-immigrants* and they sought to make their own fraud the basis for a change to a non-deportable alien with permanent residence. The petitioner here entered the United States as a permanent resident and is merely seeking to stay as such permanent resident. This section of the statute definitely applies to him.

Unfortunately the decision of the Court of Appeals is based upon a number of errors of fact, as well as errors in law.

On page 2 of the Opinion, it is stated that the substance of the petitioner's theory on appeal was that he

was not exempt from service under the IV-C classification, but was exempted under a IV-F classification. At the top of page 3 of the Opinion, it states that the petitioner argues that the record does not show that the petitioner was actually given a IV-C exemption. This was not the theory of the petitioner at all.

One of the theories of the petitioner was that he was not "effectively relieved" from military service on the grounds of the claim of exemption, since his IV-C was ignored and he was sent an occupational questionnaire and he was given a physical examination, *which is not required* of persons in IV-C as cited in the *Federal Register for 1943* at page 77.

The decision of the Court of Appeals on page 4 states that the records of the Selective Service System are "conclusive" proof of the allegation that he was exempted under IV-C. However, the attention of this Court is directed to Exhibit 7, which is in the record at page 208. This letter was from the New Jersey State Headquarters of the Selective Service and it started with a sentence, "*Official Selective Service records* reflect the following." This latter clearly showed that DR. LOOS was in fact classified IV-F, or physically unfit. The fact that the government brief states this letter was based on destroyed records, does not make it so; the letter says no such thing. It says as a matter of fact, "inasmuch as our records has (sic) been destroyed chronological listing of classifications and other information cannot be furnished". It is quite clear, therefore, that the information was *not* based on destroyed records as incorrectly shown in the decision on page 4.

As a matter of fact, Exhibit 7 was introduced into the evidence by the Government, not by DR. LOOS (see page 104 of record).

Also, on page 4 of the Opinion of the Court below, the Opinion states that the Government has sustained its burden of proof by clear, *unequivocal* and convincing evidence. But as previously shown in the paragraph two paragraphs previous to this one, the Selective Service records, themselves, were not unequivocal. This fact was, as a matter of fact, conceded by the Government, itself, when it stated in a brief filed with the Board of Immigration Appeals, "This (the fact that respondent received an exemption from military service) was not raised in the deportation hearing because *there is a question of fact whether respondent did receive a military exemption*".

The Government, itself, conceded the lack of clear, unequivocal and convincing evidence, thus admitting that its burden of proof under the standard of *Woodby* v. *I&NS*, 385 U.S. 276 (1966) was not met.

Also on page 4 of the decision of the Court of Appeals, it is stated that our reliance on *In Re Naturalization of Fabbri*, 254 F. Supp. 858 (1966) is misplaced. *Fabbri's* case is *exactly* like the Loos case. In that case, *Fabbri* executed the form requesting exemption from service on the ground of alienage on two separate occasions. The Selective Service records indicated he was classified I-A, IV-C, IV-F and IV-A, although the chronological order of these classifications was not clear from the records, just as in the *Loos* case. However, the Court granted him naturalization and stated in its opinion at page 861:

> "We conclude that one this record the petitioner is not ineligible for citizenship as we do not find that he was '*effectively relieved*' on the ground of claim

> of exemption. The record supports a finding that his IV-C classification was nullified and the alien examined for induction and classified IV-F and later IV-A; accordingly the petition is granted."

The *Fabbri* case is on all fours with the Loos case. Loos was placed in IV-C but was given a physical examination nullifying the IV-C and placed in IV-F, and later in 1945 placed in IV-A. There is no distinction whatsoever between the *Fabbri* case and the Loos case.

In the case of *U.S.* v. *Bazan*, 228 F. 2d 455 (1955), *Bazan* filed a claim for exemption, tried to withdraw the application but was not permitted to do so, so that the claim for exemption stood. He was given a IV-C, but the Court ruled that his request for a withdrawal of his exemption application operated to except him from the statutory bar to citizenship and he was granted citizenship.

At the top of page 5 of the lower Court's decision, unfortunately the Court ignored the correction in the Reply Brief that Dr. Wolf was not a member of the draft board with which Dr. Loos had originally registered in New Jersey, so that the opinion of the Court places great emphasis on the fact that Dr. Wolf was not a member of Loos' local draft board. However, Dr. Loos had registered in New Jersey and later moved to California and all matters regarding his physical examination, etc. were referred by his New Jersey Board to the local draft board in California where Dr. Loos then lived.

Dr. Wolf was therefore a member of the Selective Service System and whether he was a member of the New Jersey Board, where the original registration had been made, or of the California Board to whom the New Jersey Board referred Dr. Loos for his physical examination, *makes no difference.* Dr. Loos was entitled to rely on the

advice of a member of the Selective Service System, wherever located, particularly since Dr. Wolf was a member of the Board to whom his own original New Jersey Board had referred him.

In the middle of page 5 of the decision, the expression "highest authority" is used in discussing the advice which *Moser* received in the case of *Moser* v. *U.S.*, 341 U.S. 41 (1951). There is nothing in the *Moser* case which states that it is necessary to go to the highest authority. Also on page 5, the case of *Bouchage*, 177 F. Supp. 887 (1959) is cited with the fact that the mis-information came from a member of "his draft board", with the word "his" being in italics in the decision of the Court. I believe that we have pointed out that the fact that Dr. Wolf was not a member of the New Jersey draft board makes no difference and the reliance of the Court below in the *Bouchage* case upon the fact that the mis-information came from a member of *Bouchage's* draft board, is misplaced.

As further evidence that it is not necessary to go to the highest authority, we cite the case of *Petition of Planas*, 152 F. Supp. 456 (1957). In that case *Planas* was misinformed by a clerk at his local board and the Court stated:

> "The failure of the present petitioner to consult the 'highest authority' is not determinative because there is no suggestion in the opinion of the Court in the *Moser* case that such action is required."

Turning our attention to page 6 of the decision of the lower Court, the case of *Ntovas* v. *Ahrens*, 276 F. 2d 483, is mistakenly cited in support of the proposition that *8 U.S.C. 1251(f)*, also known as *Section 241(f) of the Immigration and Nationality Act*, does not apply to the present case. The *Ntovas* case was a case of a crewman

who had over-stayed his "shore leave" and who was charged with being deportable for that reason. That case is not applicable here because Dr. Loos entered the United States as a permanent resident, not as a temporary entrant, and in the *Ntovas* case the Court quite properly held that the claimed misrepresentation would not help *Ntovas* to obtain permanent residence as that had to be obtained by him either through adjustment of status for which a crewman is statutorily not eligible, or by leaving the United States to pick up an immigrant visa. In its original brief, the Government also improperly cited another temporary entrant case, the case of *Tsaconas* v. *I&NS*, C.A. 7, No. 16451 (June 25, 1968). This was another case in which the alien entered as a visitor, another non-immigrant status, and the charge in the Order to Show Cause was that the alien had "remained longer." The Government, itself, in its brief in the *Tsaconas* case, said that *Section 241(f)* applied only to persons in the United States for permanent residence and not to non-immigrants.

Also on page 6, the decision of the Court below states that the alien in the case of *In Re Yuen Lan Hom*, 289 F. Supp. 204 (1968), was "otherwise admissible" except for her misrepresentation. This is not correct. Mrs. Hom misrepresented that she was the wife of a United States citizen when she entered the United States, when in fact she was not. Except for the facts misrepresented, she was "otherwise admissible", but she was not "otherwise admissible" if we consider that she was not admissible because there was no immigrant visa available for her otherwise than as a United States citizen's spouse. She is, therefore, exactly the same as Dr. Loos.

The misrepresentation which the Government claims Dr. Loos made was that he was not ineligible for citizenship, and therefore excludable.

Except for that fact, there is no doubt but that Dr. Loos was "otherwise admissible". There is no other ground on which he could have been excluded or denied a visa at the time of his entry.

The *Errico* decision (*Errico-Scott Decision*, 385 U.S. 214) says, among other things, that *Section 241(f)* waives any deportation charge that results directly from the misrepresentation, regardless of the section of the statute under which the charge was brought. The decision also says that:

> "The statute would have practically no effect if construed as the Government argues since it requires a considerable stretch of the imagination to conceive of an alien making a material misrepresentation that did not conceal some factor that would make him inadmissible."

Insofar as respective equities are concerned between the *Loos*, *Yuen* and *Errico-Scott* cases, we should like to call attention to the fact that Dr. Loos had a citizen child *at the time of his entry*. At the time of her entry, *Mrs. Yuen* had a husband who was not in fact a citizen as claimed, and her three citizen children were born *after* her entry into the United States. Both *Errico* and *Scott* had children born *after* their entry, and as a matter of fact, the child of *Scott* was born illegitimately.

Also, as far as equities are concerned, in both *Loos* and *Yuen*, the representations were innocent (if in fact there was a misrepresentation by Loos). However, both *Errico* and *Scott*, wilfully, knowingly, falsely and fraudulently misrepresented, *Errico* as to the fact that he had been an auto mechanic, which was false, and *Scott* as to the fact that she was married to a United States citizen, when in fact it was a *fraudulent* marriage.

However, the Court disregarded the *wilfull* fraud on the part of *Errico* and *Scott* and held that they were saved from deportation by the statute.

We would like to again quote from the *Errico-Scott* decision:

> "The intent of the Act is plainly to grant exceptions to the rigorous provisions of the 1952 Act for the purpose of keeping family units together. Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or *even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country.* (emphasis ours)
>
> "We conclude that to give meaning to the statute in the light of its humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens, the conflict between the circuits must be resolved in favor of the aliens, and that the *Errico* decision must be affirmed and the *Scott* decision reversed."

Lastly, we should like to point out that there is a conflict between the circuits which should be resolved by the Supreme Court of the United States.

In the case of *In Re Petition of Fabbri*, 254 F. Supp. 858 (1966), it was held that an alien who had been granted exemption from the draft on the grounds of alienage, but who later was called up for a physical examination and then classified IV-F, had not been "effectively relieved" from military service. This was in the United States District Court for the Eastern District of Michigan, Southern Division, in the Sixth Circuit.

However, in the Ninth Circuit, the opposite conclusion was reached in the case of *Lapenicks* v. *I&NS*, 389 F. 2d

343 (1968). In that case, the decision was a split one, by a vote of two to one and Justice Duniway filed an excellent dissenting opinion. Although the *Fabbri* case was in the lower court in the Sixth Circuit, the fact that there was such a strong dissent in the *Lapenicks* case in the Ninth Circuit would lead me to strongly urge that the Supreme Court of the United States exercise jurisdiction to determine this question of eligibility for citizenship once and for all, to resolve the conflict between the Circuits.

There is also a conflict between the Circuits regarding the applicability of Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f) to non-immigrants. In the Seventh Circuit there are two cases which hold that a non-immigrant is not entitled to the benefit of that section. One is *Ntovas* v. *Ahrens,* 276 F. 2d 483, and the other is *Tsaconas* v. *Immigration and Naturalization Service,* C.A. 7, No. 16451 (June 25, 1968).

However, the Ninth Circuit, in a very recent case entitled *Muslemi* v. *Immigration and Naturalization Service,* case No. 22419, decided March 17, 1969, held that a non-immigrant was entitled to the benefits of Section 241(f).

It is urged that the Supreme Court should also exercise its jurisdiction to determine this question, to resolve the conflict between the Circuits.

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File No. A3 476 528—Chicago August 3, 1966

In the matter of
Ernest Werner Loos
Respondent } In Deportation Proceedings

Charges:

I & N Act—Section 241(a)(1) (8 USC 1251 (a)(1))—Excludable at time of entry—Alien ineligible to citizenship under Section 212(a)(22) (8 USC 1182(a)(22) of the Immigration and Nationality Act

Application: Termination of proceedings for the purpose of applying for naturalization

In Behalf of Respondent:
Nathan T. Notkin, Attorney
11 South LaSalle Street
Chicago, Illinois

In Behalf of Service:
Samuel D. Myers
Trial Attorney
Chicago, Illinois

DECISION OF THE SPECIAL INQUIRY OFFICER

The respondent is a 56 year old married male alien, a native and citizen of Argentina who last entered the United States at New York, New York on or about September 15, 1959. The respondent first entered the United States for permanent residence on August 3, 1940 at the port of Brownsville, Texas (Ex. 13R). On July 30, 1947 the respondent left the United States and went to Switzerland, having abandoned his status in the United States (Tr. p. 33). Thereafter, the respondent returned to the United States on September 15, 1959 (Ex. 14R). The respondent's entry on each of the two occasions was for permanent residence. In 1963 the respondent left the United States

on a vacation trip to Europe and returned six weeks later (Ex. 6, page 5). The respondent thus last entered the United States in 1963.

The respondent admitted all of the allegations in the order to show cause (Ex. 1) except allegation 7. The respondent denied that on August 23, 1943 at Stinson Beach, Marin County, California, he applied for relief from liability for training and service in the Armed Forces of the United States on the ground of alienage. It must be noted that the Government merely alleged that the respondent *applied for relief* from military service and was therefore excludable at the time of entry as an alien who is ineligible to citizenship under Section 212(a)(22) (8 USC 1182) of the Immigration and Nationality Act.

There was introduced into evidence the Form 301 signed by the respondent indicating that he had applied to be relieved from liability for training and service in the land and naval forces of the United States. That form states that the applicant, Ernesto Werner Loos, understands that in making that application he is to be relieved from liability which will debar him from becoming a citizen of the United States. The respondent admitted that this document bore his name and signature (Ex. 3).

There was also introduced into evidence a certified copy of the Selective Service record indicating that the respondent, on July 27, 1943, executed an alien's personal history statement in which he stated that he objected to service in the land and naval forces of the United States. The alien's personal history statement advised the applicant that if he is an alien, enemy or subject of a country allied with the enemy he will not ordinarily be acceptable for service in the land or naval forces of the United States if he indicates that he objects to such service. It further advised him that "If you are a citizen or subject of a neutral country and you do not wish to serve in the land or naval forces of the United States you may apply to your local board for application by alien for relief from

military service (Form 301) which, when executed by you and filed with the local board, will relieve you from the obligation to serve in the land or naval forces of the United States." Thereafter, on August 5, 1943 the respondent addressed a letter to the Draft Board (Ex. 5, letter of August 5, 1943), asking for Form 301 which he later signed.

In a sworn statement made by the respondent to an investigator of the Immigration and Naturalization Service on January 20, 1965 (Ex. 6) the respondent was asked, "Why did you find it necessary to file an application for relief from military service?" and the respondent replied, "When I was 17 years old I had an accident, plunging from a high springboard into the pool and I hurt my back; some of the lumbar vertebrae became decalcified and was bedridden for almost a year in order to get those vertebrae calcified again; and you can check it by radiograph, two of the vertebrae are completely fused together and there is a certain deformity in my spinal column; and there was a question I would be drafted for military service; I got in touch with one of the members of the medical board in Stinson Beach, California, the name was Dr. Wolf, and I ask him whether I would be drafted with my condition, and he said there would be a chance that I would be drafted; there was a possibility that I would not be able to stand this military service because of my back; I have been a whole year I could not do any sports, I had to live very quietly; and so I finally decided it would be *safer* for me to ask for relief of military service (italics supplied) (Ex. 6, page 4).

Since the Government only alleged that the respondent had applied for relief from military service and not having alleged that he received it, I took into consideration the decision rendered by the Court of Appeals in the Second Circuit, *Application of Mirzoeff*, 253 Fed. 2nd 671. In that case, the Court of Appeals is a similar fact situation found an applicant for naturalization eligible for citizenship despite his application for exemption from military

service. I therefore terminated proceedings for the limited and sole purpose of permitting the respondent to proceed towards naturalization under the Immigration and Nationality Act.

The Government appealed my order of December 28, 1965 and on April 26, 1966 the Board of Immigration Appeals remanded the case to permit the record to be fully developed as to deportability and eligibility for discretionary relief and requiring that the Special Inquiry Officer should make findings and that further action on the case should then be held in abeyance pending the outcome of interlocutory proceedings by the District Office on the respondent's pending petition for naturalization in conjunction with which the Service shall make such proposed recommendations to the court as it deems appropriate; that if the naturalization is opposed, the objections to the naturalization should be pointed out; that in the event it is found that the respondent would be eligible for naturalization except for the bar of Section 318 of the Immigration and Nationality Act, the case may then be returned to the Board for further consideration.

Pursuant to the Board's order, a further hearing was held in which the Government then amended the order to show cause by adding an additional allegation, number 9, which stated that "Based on your said application on the ground of alienage for relief from liability for training and service in the Armed Forces of the United States, you were accorded a IV-C draft status from May 22, 1944 to April 27, 1945 exempting you for that period from military service;" (Ex. 12R).

Thus, the Government by adding the additional allegation, now states that the respondent not only applied for but also received exemption on the ground of alienage. Thus, Section 315 (8 USC 1426) of the Immigration and Nationality Act comes into play.

Section 315(a) states "Notwithstanding the provisions of Section 405(b), any alien who applies for or has applied

for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien and is or was relieved or discharged from such training or service on such ground shall be permanently ineligible to become a citizen of the United States."

Section (b) of Section 315 states "The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien." (8 USC 1426).

Section 212(a)(22) (8 USC 1182) of the Immigration and Nationality Act provides "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States * * * (22) *aliens who are ineligible to citizenship*, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the Armed Forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants;"

Section 101(a)(19) (8 USC 1101(a)(19)) provides "The term 'ineligible to citizenship' when used in reference to any individual, means notwithstanding the provisions of any *treaty* relating to military service, an individual who is, or who was at any time, permanently debarred from becoming a citizen of the United States under Section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under Section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), *or under any section of this Act, or any other Act*, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or acts." (italics supplied).

Exhibit 3 contains the application signed by the respondent asking for relief from military service in which the respondent states "I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States under the Selective Training and Service Act of 1940, as amended, in accordance with the Act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States. I have not filed a declaration of intention to become a citizen of the United States."

There was also introduced into evidence Local Board Memorandum number 112 which was issued on September 29, 1942 and which was amended on June 3, 1943, which provides, "1—Classification of Aliens—Alien registrants are classified in the same manner as any other registrant. If they are relieved from or are unacceptable for military service they are placed in Class IV-C with these two exceptions, no alien shall be placed in Class IV-C." Part four of that memorandum states, "Relief from Military Service", "Circumstances under which neutral aliens may be relieved from military service—Alien registrants who are citizens or subjects of a neutral country may file application by alien for relief from military service (Form 301) as provided by Section 622.43(b), Selective Service Regulations. To assist local boards in determining whether or not an alien registrant is a citizen or subject of a neutral country there is attached to this memorandum a list of all countries divided into three groups; (1) enemy countries, (2) co-belligerent countries, and (3) neutral countries. When a change occurs in the status of any of these countries, the attached list will be amended." One of the countries listed as neutral is Argentina.

There was also introduced into evidence Exhibit 5, a certification from the Director of the Selective Service

System attaching a true and complete reproduction of all documents in the Selective Service file of Ernest Werner Loos, a registrant of Local Board number 1, Summit, Union County, New Jersey, under the Selective Training and Service Act of 1940, as amended.

Attached to that document is a Selective Service questionaire which was mailed to the respondent on December 2, 1940 and which was sworn to by the respondent on December 5, 1940. That document reveals all of the classifications given to the respondent from that date until September 21, 1945.

That questionnaire indicates that on March 14, 1941 the respondent was placed in Class IV-C. The respondent was placed in Class IV-C under 32 CFR, 1940 Supp. 603.359 which states "Class IV-C non-declarant alien (a) in Class IV-C shall be placed any registrant who is an alien who has not on file with the Federal Immigration and Naturalization Service a valid declaration of intention."

On April 3, 1942 the respondent was classified III-A until further notice in accordance with the Local Board Release number 112 dated March 14, 1942. On March 28, 1943 the respondent was classified III-B. On January 8, 1943 the respondent was classified II-A until August 1, 1943. On July 27, 1943 the respondent was classified I-A until screening. The respondent was mailed Form 304. On August 9, 1943 the respondent returned Form 304 and on the same date the respondent was mailed Form 301. On August 28, 1943 the Form 301 was received by the board and on May 22, 1944 the respondent was classified IV-C. The respondent remained in that classification until April 21, 1945 when he was reclassified IV-A.

It is therefore obvious that having claimed exemption as an alien and having signed Form 301 the respondent was classified IV-C in accordance with Local Board Memorandum number 112 (Ex. 4). Thus, the respondent applied for and received an exemption from military service from

May 22, 1944 until September 21, 1945 when he was classified IV-A.

Based upon the foregoing facts, it is determined that under Section 315 of the Immigration and Nationality Act the respondent became permanently ineligible to become a citizen of the United States since he applied for and was relieved from such training or service in the Armed Forces of the United States on the ground that he is an alien. Furthermore, the respondent falls within the provisions of Section 101(a)(19) of the Immigration and Nationality Act as being an alien ineligible to citizenship for two reasons: first, that he was permanently debarred from becoming a citizen of the United States under Section 3(a) of the Selective Service and Training Act of 1940 having applied for relief from military service, and second, he applied for and was relieved from military service which made him permanently ineligible to citizenship under Section 315 of the Immigration and Nationality Act.

It is further determined from the foregoing evidence that the respondent filed his application for relief from military service knowingly and intentionally; that he realized the consequences of his act and knew that he would be debarred from citizenship forever upon signing the Form 301. The respondent never claimed that he executed the application 301 either by mistake or under duress (*Cebbalos* v. *Shaughnessey*, 352 U.S. 599 (1957)).

The respondent therefore, when he returned to the United States on September 15, 1951 was then ineligible to citizenship and was therefore excludable under the provisions of Section 212(a)(22) of the Immigration and Nationality Act. The Government did not allege in its order to show cause that the respondent was excludable on his 1963 entry and therefore no finding will be made as to respondent's excludability in connection with that entry.

Since the respondent, having applied for and having been relieved from military service, clearly comes within the

provisions of Section 315 of the Immigration and Nationality Act, he is therefore excludable under Section 212(a)(22) and the *Mirzoeff* decision, supra, is not applicable. Thus, there is no reason to terminate these proceedings for the purpose of permitting the respondent to apply for citizenship, as the respondent is clearly ineligible for citizenship under the provisions of Section 101(a)(19) and Section 315 of the Immigration and Nationality Act.

The respondent's only application for relief from deportation was in the form of voluntary departure. The respondent has established clearly that he is eligible for that form of relief, and as a matter of administrative discretion, this privilege will be accorded him. The respondent designated Argentina as the country to which his deportation shall be directed if required by law.

ORDER: IT IS ORDERED that in lieu of an order of deportation, the respondent be granted voluntary departure without expense to the Government within such time and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be deported from the United States to Argentina on the charge contained in the order to show cause.

IT IS FURTHER ORDERED that these proceedings be certified to the Board of Immigration Appeals.

/s/ Irving I. Freedman
Irving I. Freedman
Special Inquiry Officer

APPENDIX "B"

(Letterhead of United States Department of Justice)

September 27, 1967

Board of Immigration Appeals

Loos
A-3476528

Nathan T. Notkin, Esquire
11 South La Salle Street
Chicago, Illinois 60603
Dear Mr. Notkin:

Reference is made to your interest in the above case.

For your information, there is enclosed herewith copy of the decision and order of the Board of Immigration Appeals.

Sincerely yours,
/s/ Thos. G. Finucane
Thos. G. Finucane
Chairman

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

Sep 27 1967

File: A-3476528—Chicago
In re: ERNEST WERNER LOOS
IN DEPORTATION PROCEEDINGS
MOTION
ORAL ARGUMENT: July 31, 1967

On behalf of respondent: Nathan T. Notkin, Esquire
11 South La Salle Street
Chicago, Illinois 60603

On behalf of I&N Service: Irving A. Appleman, Esq.
Appellate Trial Attorney

CHARGES:

Order: Sec. 241(a)(1), I&N Act (8 USC 1251 (a)(1))—Excludable at time of entry—alien ineligible to citizenship under section 212 (a)(22) of the I&N Act (8 USC 1182(a)(22))

Lodged: None

APPLICATION: Termination of proceedings for the purpose of applying for naturalization

Respondent sought judicial review after we found him deportable on October 28, 1966. The United States Court of Appeals for the Seventh Circuit remanded the case to the Board on May 22, 1967 after the Government had moved for a remand so the Board could review the case under standards concerning proof set forth in *Woodby* v. *Immigration and Naturalization Service,* 385 U.S. 276 (December 12, 1966).

The facts have been fully stated in previous orders and need not be repeated.

The first question is whether the respondent was exempted from military service. The Service charges respondent was exempt from May 22, 1944 to April 27, 1945. We find he was exempted during that period. The record clearly establishes that a time when respondent who was liable for service was in a nondeferred, nonexempt status, he submitted an application for exemption from service as a neutral alien, that his draft board received the application, and that the next action taken by the board placed him in the class exempt from service—the class provided by regulation for aliens who had filed such a request. Applicant was not called for service while he was a neutral alien. The pertinent facts are established by proof which is clear, unequivocal and convincing. In view of these facts, counsel's contention that respondent was not granted an exemption because the local board required him to do things one exempt would not have had to do, must be found without substance.

Respondent claims that filing of the application for exemption was based upon misinformation given to him by a doctor connected with a draft board (not his own). We do not believe that respondent has established that he was misinformed. Respondent's back condition requires him to minimize his physical activity. His testimony is that he asked the doctor if his back condition would prevent him from being inducted and was told that it was possible that he could be inducted. Respondent has failed to establish this information was incorrect, or that if it was incorrect it was given under circumstances which should have caused him to rely upon it. To avoid the possibility of induction, respondent filed claim for exemption. That his reason was to avoid injury to his back and not because he did not wish to fight, is immaterial under the law.

Counsel contends that if exemption was granted, respondent was not effectively relieved because Argentina became a cobelligerent on March 27, 1945 and respondent then again became eligible for service. The bar to citizenship created by a grant of exemption is not removed because the alien subsequently becomes eligible for service (*In re Bergman,* 173 F. Supp. 880 (D. Minn. 1959); *Matter of J—,* 2 I&N Dec. 545, A.G. (1947)). The precedent cases cited by respondent have been carefully examined and we believe they are distinguishable. *United States* v. *Bazan,* 228 F.2d 455 (D.C. Cir. 1955), turned on the fact the record did not establish the alien had been relieved. Here, the record does establish that an alien eligible for draft was relieved. *In re Fabbri,* 254 F. Supp. 858 (E.D. Mich. 1966), concerned an alien whose exemption was nullified while he was apparently still entitled to it. Here, respondent's exemption was not nullified while he was entitled to it.

We do not believe the deportation proceedings should be terminated to permit respondent to have a hearing upon his petition for naturalization. It is our opinion that respondent is clearly ineligible for naturalization.

Counsel asks that if we find respondent is ineligible to citizenship, we find that this ground of inadmissibility was waived by section 241(f) of the Act under the rationale of *Errico* v. *Immigration and Naturalization Service,* 17 L.ed. 318. We do not think *Errico* applies for it involved fraud. It is clear here there was no fraud. Counsel agrees that respondent did not commit fraud in applying for the visa by failing to state he was ineligible to citizenship, but counsel believes that since respondent would have been ineligible for the visa (if we find he was granted an effective exemption), he should be considered as having obtained it by fraud. We believe *Errico* is distinguishable. It is our belief that *Errico* does not go beyond holding that certain persons who would have been admissible if they had proper documents may be admitted even if they obtained the documents by fraud. The respondent could not have been legally admitted for permanent residence even if he had the proper documents.

After careful reconsideration of the entire record including counsel's oral argument and briefs, we conclude that the deportation charge is sustained by evidence which is clear, unequivocal and convincing.

We have considered respondent's good faith, his good record in the United States, his family ties and his needed skill, but we find no administrative relief which can permit him to remain legally.

(The first full paragraph on page 7 of our order of October 28, 1966 is corrected to read as follows:

On April 27, 1945, the day the local board received respondent's Form 42A (executed on April 21, 1945) they continued him in Class IV-C. Respondent became 36 in August 1945. He was classified IV-A (overage) on September 21, 1945. No classification change follows this action.

Item 4 on page 3 of the appendix is corrected to show that the local board reclassified respondent in Class IV-A on September 27, 1941 rather than April 27, 1945.)

ORDER: It is ordered that in lieu of an order of deportation, the respondent be granted voluntary departure without expense to the Government within such time and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: The respondent shall be deported from the United States to Argentina on the charge contained in the Order to Show Cause.

Chairman

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 16551 SEPTEMBER TERM, 1968 SEPTEMBER SESSION, 1968

ERNEST WERNER LOOS,
Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

Petition for Review of an Order of the Immigration and Naturalization Service.

FEBRUARY 19, 1969

Before CASTLE, *Chief Judge,* KILEY and KERNER, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a petition to review and set aside an order of the Immigration and Naturalization Service (INS) for deportation of petitioner Loos should he not voluntarily depart from the United States. We affirm.

Loos, a native of Argentina, South America, was originally admitted to the United States for permanent residence August 3, 1940. He registered for military service with Local Board No. 1, Union County, Summit, New Jersey. On July 30, 1947, he departed from the United States and lived in Switzerland until 1959. He was readmitted to the United States for permanent residence September 14, 1959. He left the United States for a six weeks vacation in 1963 and re-entered the United States the same year.

On November 24, 1965, an Order to Show Cause and Notice of Hearing issued ordering his appearance before

a Special Inquiry Officer to show cause why he should not be deported.

The Inquiry Officer determined that Loos was permanently ineligible for United States citizenship under the Immigration and Naturalization Act, 8 U.S.C. § 1101, *et seq.*—having applied for, and having received an exemption from military service as an alien under a IV-C classification[1]—was excludable under Sec. 212(a)(22) of the Act, 8 U.S.C. § 1182(a)(22)[2], when he re-entered the United States in 1959, and was therefore deportable under Sec. 241(a)(1) of the Act, 8 U.S.C. § 1251(a)(1).[3]

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[1] § 1426 (a) . . . [A]ny alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

[2] § 1182

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants;

* * * * *

[3] § 1251(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

On review, the Board of Immigration Appeals affirmed. Loos filed a petition for review in this court, and the court, on the government's motion, remanded the case to the INS for reconsideration under standards of proof set forth in *Woodby v. INS*, 385 U.S. 276 (1966). The Board of Immigration Appeals reconsidered and again affirmed the decision of the Special Officer. The petition before us followed.

The substance of Loos' theory on appeal is that he was not exempted from service under a IV-C classification, but was exempted under a IV-F classification. The point is crucial for him because a IV-C exemption would bar him permanently from citizenship, whereas a IV-F exemption would not. He argues that the record does not show he was actually given a IV-C exemption and therefore Sec. 1426(a) does not apply to bar him from citizenship under the ruling in *Application of Mirzoeff*, 253 F.2d 671 (2d Cir. 1958). In support of this, he argues that his application for the IV-C classification was ignored; that he was given a physical examination by his local board, needless for a IV-C status, but needed for IV-F; and that his local board actually classified him IV-F, as shown by a letter in evidence, because of an old back injury.

The record clearly shows his application for IV-C classification was not ignored. Actually there is substantial evidence supporting the Board's finding that Loos' application for that classification was granted.

At the remandment hearing, the INS Order to Show Cause was amended to allege that the alienage exemption was granted, by the Selective Service System, for the period May 22, 1944, to April 27, 1945. Originally the charge was merely that he had applied.

The Director of the Selective Service System transmitted to the INS an application dated August 23, 1943, signed by Loos, for relief from military service under

Sec. 305(a), Selective Service and Training Act of 1940.[4] Among other statements made by Loos in the application were: "I understand that the making of this application . . . will debar me from becoming a citizen of the United States,"[5] and "I have not filed a declaration to become a citizen of the United States." The application was granted and Loos was classified IV-C, a status that actually exempted him from military service from May 22, 1944, to April 27, 1945, on the ground of his alienage. The records of the Selective Service System are "conclusive" proof of the allegation. 8 U.S.C. § 1426(b)[6]

There is in the record a letter from the New Jersey Selective Service Headquarters which lists a IV-F classification for Loos. The Board of Appeals, however, found that the letter also showed the Headquarters records had been destroyed and that the letter did not indicate the basis of the statement that Loos had been classified IV-F. The Board decided that this letter and Loos' "incomplete memory" of events were insufficient to support a finding that he was relieved from military service because of the IV-F classification—since the official records of the Selective Service System show no

---

[4] § 305(a). Exceptions, exemptions, or deferments from training and service.

[P]ersons in other categories to be specified by the President, residing in the United States, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States, . . . shall be relieved from liability for training and service. . . .

(50 U.S.C.App. (1944 ed.) 305(a)).

[5] Under 8 U.S.C. § 1426.

[6] § 1426 (b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.

such classification but show conclusively the exemption under the IV-C classification. We conclude the Board did not err in finding an insufficiency of evidence of a IV-F classification in the light of the conclusive proof of the IV-C classification.

The government has sustained its burden of proof under the standard of *Woodby v. INS*, 385 U.S. 276, 277 (1966), by producing clear, unequivocal and convincing evidence. This precludes Loos from United States citizenship Sec. 1426 by virtue of the relief granted him on his alienage exemption IV-C classification. Loos' reliance on *In re Naturalization of Fabbri*, 254 F. Supp. 858 (E.D. Mich. 1966), is misplaced. There, in a naturalization proceeding, the district court, on the record of the State of Michigan Selective Service System, decided that Fabbri's IV-C classification had been nullified, since he had been examined, classified IV-F, and later IV-A. Fabbri's petition for naturalization was allowed. And in *United States v. Bazan*, 228 F.2d 455 (D.C. Cir. 1955), the court said there was no evidence in the record to support the Examiner's recommendation that Bazan's petition for naturalization should be denied. The court affirmed the district court's granting of the petition. In the case before us, however, there is the necessary evidence.

There is no merit to Loos' claim that Sec. 1426 does not apply to him because he was "mistakenly" advised by a Dr. Wolf, "a member of the draft board," that he could possibly be drafted despite his back injury and that the only sure way to avoid the draft was to apply for the alienage exemption. We shall assume, for purpose of this claim, that the advice is relevant. In the first place, Dr. Wolf was not a member of Loos' local draft board. In the second place, the doctor did nothing more than advise Loos on the correct draft situation. He merely advised Loos that it was possible to get drafted even with a bad back, and that the only sure was to avoid

the draft was to apply for a IV-C alienage exemption. Loos followed the advice.

The decision in *Moser v. United States,* 341 U.S. 41 (1951), is of no aid to Loos for the reason, among others, that there the petitioner was incorrectly advised by the Swiss Legation to claim exemption as an alien. The United States State Department deleted the "express waiver of citizenship," and but for advice from the "highest authority" Moser would not have signed. Nor is *In re Bouchage,* 177 F. Supp. 887 (S.D. N.Y. 1959), helpful to Loos. There a minor French citizen was misinformed by a member of *his* draft board that the only way to enlist in the French forces without relinquishing his French citizenship was to apply for alienage exemption.

Loos finally contends that if he is deportable as ineligible for citizenship under Sec. 1426(a), then he misrepresented to the American Consul in Switzerland in 1959 by stating that he was not "a person ineligible" for United States citizenship, and that therefore, because his wife and son are United States citizens, he should not be deported by reason of Sec. 241(f) of the Act, 8 U.S.C. § 1251(f).[7]

We shall assume, without deciding, that Loos' statement to the American Consul constitutes a misrepresentation within the meaning of Sec. 1251(f).

However, Loos cannot receive protection of Sec. 1251(f). He was ordered deported, not because he perpetrated fraud or made a misrepresentation to the American Con-

[7] § 1251(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

sul in Switzerland in 1959, but because he applied for and received an exemption from service in the armed forces, on the ground of alienage, in 1944. Section 1251(f) is applicable, by its express wording, only to deportation on the ground that the alien gained entry into the United States by fraud or misrepresentation. It applies only if the alien was "otherwise admissible" into the United States. Loos was not "otherwise admissible" in 1959, because he had prior to that time applied for and received an exemption from the armed services.

The contention of Loos, if accepted, would allow any deportable alien, once he has left this country, voluntarily or by deportation, who subsequently gains entry by fraud or misrepresentation, to be immune from deportation if he was a spouse, parent or child of a United States citizen. That construction, however, is much too broad. We read Sec. 1251(f) as applicable where a person could be deported *on the grounds* of entry gained by fraud or misrepresentation, and who, but for the fraud or misrepresentation, is "otherwise admissible" into the United States. See *Ntovas* v. *Ahrens*, 276 F.2d 483 (7th Cir.), *cert. denied*, 364 U.S. 826 (1960); Gordon and Rosenfield, IMMIGRATION LAW AND PROCEDURE § 4.7c(1) and cases cited therein.

Loos relies mainly on *In re Yuen Lan Hom*, 289 F.Supp. 204 (S.D. N.Y. 1968). In that case, the INS conceded that petitioner Yuen Lan Hom was qualified in every respect, except for her misrepresentation, to acquire United States citizenship. In *Yuen Lan Hom*, petitioner was "otherwise admissible." In this case, Loos is not "otherwise admissible."

For the reasons given, the petition to review and set aside the deportation order is denied.

APPENDIX "D"

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Monday, March 24, 1969

Before

Hon. Latham Castle, Chief Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Otto Kerner, Circuit Judge

ERNEST WERNER LOOS, *Petitioner,* vs. IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*	Petition for Review of an Order of the Immigration and Naturalization Service.

No. 16551

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 275

ERNEST WERNER LOOS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 15a-21a) is reported at 407 F. 2d 651.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1969. A petition for rehearing was denied on March 24, 1969. The petition for a writ of certiorari was filed on June 23, 1969, a Mon-

day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the determination of the Board of Immigration Appeals that petitioner was inadmissible into this country in 1959 as an alien ineligible to citizenship was supported by clear, convincing and unequivocal evidence.

2. Whether the Board properly declined to terminate the deportation proceedings so as to permit petitioner to apply for naturalization.

3. Whether the Board correctly concluded that, when petitioner entered the United States in 1959, he was not "otherwise admissible" and was thus ineligible for relief from deportation for misrepresentation of his eligibility for citizenship under Section 241(f) of the Immigration and Nationality Act (8 U.S.C. 1251(f)).

STATUTES INVOLVED

The Immigration and Nationality Act of 1952, 66 Stat. 163 *et seq.*, as amended, provides, in pertinent part:

Section 101 (8 U.S.C. 1101):

(a) As used in this Act—

* * * *

(19) The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from

becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

Section 212 (8 U.S.C. 1182):

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * *

(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants;

* * * *

Section 241 (8 U.S.C. 1251):

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * *

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

Section 315 (8 U.S.C. 1426):

(a) Notwithstanding the provisions of section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.

Section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 55 Stat. 845, provides, in pertinent part:

Sec. 3(a) * * * *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be

relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any such person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *."

STATEMENT

1. Petitioner Ernest Werner Loos, a native and national of Argentina, was originally admitted to the United States for permanent residence on August 3, 1940 (R. 200-201).[1] He departed the country to live in Switzerland on July 30, 1947 (R. 200-201). He reentered the country on September 15, 1959, as a non-quota immigrant for permanent residence and, except for a vacation abroad in 1963, has remained in the United States since 1959 (R. 127, 139, 203, 224-230).

In 1965 he was charged with being deportable under Section 241(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(1)), on the ground that, at the time of his entry in 1959, he was excludable under Section 212(a)(22) of that Act (8 U.S.C. 1182(a)(22)), as being ineligible for citizenship because of his previous application for relief from military service on the ground of alienage made during World War II (R. 98, 139-141). Following a hearing, the special inquiry officer ordered the proceedings terminated for the purpose of permitting petitioner to proceed toward naturalization (R. 92-

[1] "R." refers to the certified copy of the administrative record which is on file with the Clerk of this Court.

95). On appeal by the Immigration and Naturalization Service, the Board of Immigration Appeals reversed the special inquiry officer's decision and remanded the case for further proceedings (R. 214-216).

After a reopened hearing the special inquiry officer found that petitioner had applied for and received an exemption from military service from May 22, 1944, until September 21, 1945, on the ground of alienage, and thus was permanently debarred from citizenship under Section 315 of the Act (8 U.S.C. 1426). Accordingly, he found that petitioner was deportable, and that it would be useless to terminate the deportation proceedings to permit him to apply for naturalization. The special inquiry officer granted voluntary departure and, in the event of failure to depart, directed deportation to Argentina (Pet. App. 1a-9a; R. 65-75). He then certified the case to the Board, which, on October 28, 1966, affirmed his order (R. 48-59).

A petition for review in the court of appeals was, on the government's motion, remanded for further proceedings in the light of this Court's decision in *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276 (R. 36-38). Following that remand, on September 27, 1967, the Board of Immigration Appeals found that the record contained clear, convincing and unequivocal evidence that, at a time when petitioner was eligible for military service and was in a non-deferred, non-exempt status, he applied for and was granted exemption from military service

as a neutral alien. It ruled that he was deportable as an alien ineligible for citizenship at the time of his 1959 entry to the United States (R. 306). The Board granted voluntary departure and, alternatively ordered deportation, thus supplanting the earlier similar order of the special inquiry officer (Pet. App. 11a-14a). On appeal the court of appeals affirmed the Board's decision by dismissing a petition for review filed under Section 106(a) of the Act (8 U.S.C. 1105a (a)).

2. The evidence in the administrative proceedings, which includes petitioner's Selective Service file, showed that he registered for the draft in Summit, New Jersey, shortly after his arrival in the United States in 1940 (R. 153, 201). On March 14, 1941, he was classified IV-C (resident alien who had not declared his intent to become a citizen) under Section 3(a) of the Selective Training and Service Act of 1940, which provided for military service of "every male alien residing in the United States who has declared his intention to become * * * a citizen" (54 Stat. 885; 32 C.F.R. 603.359 (1940 Supp.)). On December 20, 1941, Congress amended the Act to provide for military service for all male alien residents of the United States except, *inter alia*, citizens of neutral countries who made application to be relieved of liability for military service prior to their induction into the Armed Forces (55 Stat. 845). As a citizen of a neutral country (Argentina), petitioner became liable for military service under this amendment unless application for relief was applied for and granted (R. 140-151). Thereafter, petitioner

went through a series of reclassifications terminating in a classification of I-A pending receipt of a Form DSS-304—an Alien Personal History and Statement (R. 58).[2]

On August 5, 1943, petitioner sent a letter to his New Jersey draft board returning the Form DSS-304 fully executed and requesting a Form DSS-301, the application for relief from military service on the ground of alienage (R. 58). On August 23, 1943, petitioner executed the Form 301 before an official of a local board in California where he was then residing (R. 145). That form contained the following warning: "I understand that the making of this application to be relieved from such liability [service in the land or naval forces of the United States under the Selective Training and Service Act of 1940] will debar me from becoming a citizen of the United States." Petitioner filled in all of the required information above and below the warning on ineligibility for citizenship, including the words "have not" to complete the sentence: "I have not filed a declaration of intention to become a citizen of the United States."[3]

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[2] During this period, petitioner received at least the following classifications: III-A (dependency deferment) on April 3, 1942; III-B (occupational deferment) on March 20, 1943; II-A (type not indicated in file) on June 8, 1943 (R. 57). His certified Selective Service record does not contain a notation of classification of IV-F (physically unfit) ever being given to petitioner.

[3] On January 10, 1965, an investigator for the Immigration and Naturalization Service took a sworn statement from petitioner and asked him whether he had read the application for relief from military service at the time he signed it. He answer, "Well, the way you do it, you don't read every little

The draft board received the Form 301 on August 28, 1943 (R. 58, 145). On May 17, 1944, the board received an application from petitioner for an occupational deferment (R. 58). The following day, a notation was entered in his Selective Service file indicating his eligibility for a IV-C classification (R. 58). On May 22, 1944, he was reclassified IV-C (R. 58).

On March 27, 1945, Argentina became a co-belligerent by a declaration of war on the Axis powers (R. 53, 58). Petitioner was sent a Form DSS-42A to obtain information for reclassification (R. 59). On April 27, 1945, the day the completed from was received by the local board, petitioner was continued in his IV-C classification (R. 6, 59). He became 36 years of age in August 1945 and was reclassified IV-A (overage) on September 21, 1945 (R. 6). No subsequent classifications are reflected in the Selective Service file.

Petitioner testified that, when it seemed that he might be drafted sometime in 1943, he got in touch with one Dr. Wolf, a member of a Selective Service medical board in California, to inquire whether there was a chance he would be drafted with his bad back.

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paragraph, but I thought I understood what I was doing. I did not see any implication that I would not be allowed to enter." The investigator then asked, "You understood the form then, is that correct?" Petitioner responded, "Yes" (R. 207). During the reopened deportation hearing on May 23, 1966, the special inquiry officer asked petitioner whether he knew that by signing the Form 301 he would be ineligible to citizenship. Petitioner answered that he realized that, but he saw no connection between that and excludability (R. 135).

Dr. Wolf told him that he could not guarantee exemption from military service (R. 107, 201-202). Petitioner decided that he would be taking a risk if he was drafted and "finally decided it would be safer * * * to ask for relief from military service" (R. 202; see also R. 109-110, 134, 231-232).[4]

ARGUMENT

1. The evidence amply supports the deportation order under the "clear, unequivocal and convincing" standard enunciated by this Court in *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276. Thus, further review is not warranted.

The statutory basis for petitioner's deportation is not in dispute. Aliens in the United States are subject to deportation if they were excludable by the law existing at the time of their entry into the United States, under Section 241(a)(1) of the Act (8 U.S.C. 1251(a)(1)). An alien seeking to come to this country as an immigrant cannot obtain an immigrant visa and must be excluded from admission if he is ineligible to citizenship at the time of entry, pursuant to Section 212(a)(22) of the Act (8 U.S.C. 1182(a)

[4] In April 1965, the New Jersey State Headquarters of the Selective Service System had written to the Immigration and Naturalization Service listing petitioner's classifications as III-A—Dependency; IV-A—Overage; IV-C—Alien requesting relief from liability, not acceptable to the Armed Forces; and IV-F—physically, mentally or morally unfit. The letter went on to say that that office's records had been destroyed, and that therefore the chronology of the classifications and other information could not be furnished and the reason for the IV-F classification could not be determined (R. 208, 105).

(22). Under Section 315(a) of the Act (8 U.S.C. 1426(a)), any alien who applies for exemption from service in the Armed Forces of the United States on the ground that he is an alien and is relieved from service on such ground is permanently ineligible to become a citizen of the United States.[5]

The record is clear that when it became apparent to petitioner that he might be drafted, in spite of his physical condition, he made an informed decision in August 1943 to apply for relief from military service on the ground that he was an alien citizen of a neutral country.[6] He admitted in the course of the

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[5] Section 315 of the Immigration Act became effective on December 24, 1952. Section 3(a) of the Selective Training and Service Act of 1940 had barred from citizenship any alien who *applied* for the alien exemption, regardless of whether he was actually relieved of service on that ground. See *Ceballos* v. *Shaughnessy*, 352 U.S. 599, 605-606. Since the instant order to show cause, as amended, alleged and the proof showed both application for and relief from service on the ground of alienage, there is no occasion to consider the difficult question whether mere application for exemption prior to December 1952 makes an alien ineligible to citizenship in proceedings commenced after December 24, 1952—the distinction relied on by the special inquiry officer here in initially declining to order deportation, before respondent amended its allegations in this regard (see Pet. App. 3a-4a). See *United States* v. *Hoellger*, 273 F. 2d 760, 763, n. 3 (C.A. 2); Section 101(a)(19) of the Immigration Act (8 U.S.C. 1101(a)(19)). Petitioner was ineligible for citizenship under either provision, and the pleadings were appropriately amended to obviate this potential difficulty (see Pet. App. 4a). *Application of Mirzoeff*, 253 F. 2d 671 (C.A. 2), upon which petitioner relies, was a naturalization case and inapposite here. Mirzoeff never was classified IV-C and never was relieved from military service on the ground of alienage.

[6] Although petitioner indicates (Pet. 6, 9) that he applied for exemption on the basis of the treaty in effect between

administrative proceedings that he knew that merely making the application would permanently bar him from citizenship. His certified Selective Service file shows without contradiction that on May 22, 1944, he was given an alien exemption based on his application by being classified IV-C. When Argentina became a co-belligerent in March 1945, petitioner was forwarded appropriate forms to obtain information to reassess his classification. He was eventually classified IV-A (overage) following his thirty-sixth birthday in August 1945 and never served in the Armed Forces of the United States.[7]

Although there was some unexplained delay in the board's action in classifying petitioner IV-C, mere delay in processing the application for an exemption would not affect the validity of the IV-C classification. Cf. *United States ex rel. Circella* v. *Sahli*, 216 F. 2d 33, 39-40 (C.A. 7), certiorari denied, 348 U.S. 964. Nor did petitioner's application for an occupational deferment, filed on May 17, 1944, which probably called the local board's attention to the still-pending alien exemption application, operate to rescind the application for exemption from service. *Giz* v. *Brownell*, 240 F. 2d 25, 27, 30 (C.A.D.C.), certiorari denied, 353 U.S. 942; *Brownell* v. *Rasmussen*, 235 F. 2d 527, 530 (C.A.

Argentina and this country, the record shows that he did so solely on the basis of Argentina's status as a neutral country.

[7] As petitioner points out (Pet. 16-17; see also Pet. App. 13a-14a), the reasons for some of the local board's actions during the second half of 1945 are not discernible from the Selective Service file and some confusion arises. These later events, however, have no effect upon the alien exemption which he had during 1944 and early 1945.

D.C.), certiorari dismissed, 355 U.S. 859; *Machado* v. *McGrath*, 193 F. 2d 706, 709-710 (C.A.D.C.), certiorari denied, 342 U.S. 948; *Application of Mannerfrid*, 101 F. Supp. 446 (S.D.N.Y.), affirmed, 200 F. 2d 730 (C.A. 2). Moreover, having obtained relief from service on the ground of alienage, petitioner's eligibility for citizenship, at least in the absence of subsequent actual service in the Armed Forces,[8] could not be reinstated because he might have been subject to service when Argentina became a cobelligerent, as he suggests. *Kahook* v. *Johnson*, 273 F. 2d 413 (C.A. 5); *Petition of Skender*, 248 F. 2d 92 (C.A. 2), certiorari denied, 355 U.S. 931. Similarly, his subsequent classification of IV-A (overage) did not prevent his prior IV-C exemption from "effectively relieving" him from military service for the time it was effective. *Gilligan* v. *Barton*, 265 F. 2d 904 (C.A. 8).

Petitioner's argument that the record does not support the conclusion that he was in fact exempted from service as an alien is based essentially on the 1965 letter from the New Jersey State Headquarters of the Selective Service System that he had at some unknown time been given, among other classifications,

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[8] Although early cases held that the disqualification attached upon the making of the application and could not be removed by subsequent service in the Armed Forces, later cases have taken the position that when the alien is inducted and actually serves in the Armed Forces, the previous bar to naturalization based on exemption from military service for alienage is removed. See *United States* v. *Hoellger*, 273 F. 2d 760 (C.A. 2); *Cannon* v. *United States*, 288 F. 2d 269 (C.A. 2); *In re Rego's Petition*, 289 F. 2d 174 (C.A. 3); *United States* v. *Lacher*, 299 F. 2d 919 (C.A. 9).

a IV-F exemption. As noted by the court of appeals, the Board of Immigration Appeals was warranted in giving credence to the intact, official Selective Service file certified by the Director of the Selective Service System over a letter from State Headquarters that they had destroyed their records and had no chronology of classifications or basis for a IV-F classification that could be furnished. Certainly, when coupled with petitioner's vague and incomplete memory of events surrounding a physical examination and an alleged IV-F classification of which he has no record, the Board's reliance on the official file was reasonable, if not compelled, particularly in view of Section 315 (b) of the Act (8 U.S.C. 1426(b)).

Petitioner's further contention that he was misled by a certain doctor into following the safe route of applying for an alienage exemption rather than seek a IV-F classification (Pet. 11-15) is frivolous on his own statement of the facts. When it appeared that he might be drafted, petitioner apparently sought the advice of a Dr. Wolf, a physician who was a member of a Selective Service medical board in California, but was not connected with petitioner's own draft board. Petitioner's statements show that Dr. Wolf merely declined to give him any assurance that his physical condition would exempt him from the draft at some future date. Petitioner's physical condition, which he dated back to a teenage accident some thirteen years prior to coming to this country, must not have been completely disabling for military service since he stated in his Selective Service registration questionnaire in 1940, before the war started, that

to the best of his knowledge he had no physical or mental defects or diseases (R. 52, 157).

Circumstances which existed in *Moser* v. *United States*, 341 U.S. 41, and other cases cited by petitioner (Pet. 12-15), which have induced the courts to relieve an applicant for exemption from military service on the grounds of alienage from the bar against subsequently acquiring citizenship, essentially on the theory that the alien did not make an intelligent choice due to misinformation from an official source, are absent here. *E.g.*, *In re Bouchage's Petition*, 177 F. Supp. 887 (S.D.N.Y.); *Petition of Sally*, 151 F. Supp. 888 (S.D.N.Y.). Petitioner made a reasoned and deliberate decision to apply as a neutral alien for exemption from military service with the knowledge that it would permanently bar him from citizenship. He obtained an exemption on that basis, and was thereby "effectively relieved" from service. Having done so, petitioner must live with the legal consequences of his decision. *Lapenieks* v. *Immigration and Naturalization Service*, 389 F. 2d 343 (C.A. 9), certiorari denied, 391 U.S. 951; see also *Aklin* v. *United States*, 340 F. 2d 746, 748 (C.A. 2); *Prieto* v. *United States*, 289 F. 2d 12, 14 (C.A. 5).

2. Petitioner contends that the Board abused its discretion in refusing to terminate the reopened proceeding pending adjudication of an application for naturalization on its view that the evidence establishing petitioner's ineligibility for citizenship showed that delay for that purpose would be a meaningless

gesture (Pet. 18-19).[9] Although the Attorney General may terminate deportation proceedings to permit an alien to apply for naturalization, there is no occasion to do so unless the petitioner can show that there is some significant chance of success in obtaining naturalization. *Matter of Hroncich*, 11 I. & N. Dec. 193. Petitioner has clearly failed to make such a showing here. Indeed, he has failed to sustain his position on eligibility to citizenship in the context of deportation proceedings, where an unusually heavy burden of proof rests upon the government. In a naturalization proceeding "the burden is on the alien applicant to show his eligibility for citizenship in every respect," and doubts are to be "resolved in favor of the United States and against the claimant." *Berenyi* v. *District Director*, 385 U.S. 630, 636-637. Petitioner's claim of abuse of discretion in not deferring to a naturalization court is thus without substance.

3. At the consulate in 1959, petitioner erroneously answered negatively on his visa application a question which called for the applicant to state whether he was a member of listed excludable classes, including aliens ineligible to citizenship. At the deportation hearing, petitioner testified that he was not aware that he was excludable on that ground and never had connected ineligibility for citizenship with

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[9] Termination of the deportation proceeding would be required since Section 318 of the Immigration and Nationality Act (8 U.S.C. 1429), provides that no person against whom there is a final finding of deportability shall be naturalized and no petition of naturalization shall be heard by a naturalization court if a deportation proceeding is pending against the alien seeking naturalization.

inadmissibility to the United States (R. 125-129, 135, 203-204). Petitioner argues that, on this basis, he is entitled to a waiver of deportation under Section 241(f) which eliminates the fact of fraud and misrepresentation in obtaining entry into the United States as a ground of deportation for certain aliens with close family ties in the United States, if they were "otherwise admissible" at the time of their entry. The provision on its face applies only to misrepresentations for which an alien may be excluded or deported. The only such provision is Section 212(a)(19) (8 U.S.C. 1182(a)(19)), which excludes aliens who have procured entry into the United States by fraud or *willful* misrepresentation. There is therefore no occasion to invoke Section 241(f) here. Indeed, if this type of misrepresentation waives the ground of exclusion, an alien innocently fails to disclose, none of the exclusionary provisions would ever provide a basis for deportation under Section 241(a)(1) of the Act (8 U.S.C. 1251(a)(1).[10]

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[10] *In re Yuen Lan Hom*, 289 F. Supp. 204 (S.D.N.Y.), is erroneous in applying Section 241(f) to an innocent misrepresentation. In that case, a woman thought she entered the country as the wife of a United States citizen. In fact her husband was an alien. When this fact was discovered, she had her status adjusted to permanent residence to cure the defect. In subsequent naturalization proceedings, the court applied Section 241(f) to the unintentional misrepresentation in order to back date her entry into permanent residence status to her original entry date, thus making her eligible for naturalization without further delay. Although the Immigration and Naturalization Service has acquiesced in the decision as applied to naturalization proceedings, we think it clear that Section 241(f) was never intended to apply to innocent misrepresentations which simply could not provide a basis for separation of families or deportation.

Even if Section 241(f) were applicable in the instant circumstances, petitioner nevertheless would be qualitatively excludable from this country, not for any fraud, but because he was ineligible to citizenship. Therefore, he is not "otherwise admissible" within the purview of Section 241(f). *de Vargas* v. *Immigration and Naturalization Service*, 409 F. 2d 335 (C.A. 5), pending on petition for a writ of certiorari, No. 479 Misc., this Term; *Espinosa* v. *Immigration and Naturalization Service*, 404 F. 2d 544 (C.A. 9); *Matter of Eng*, 12 I. & N. Dec. 855. As those decisions correctly point out, *Immigration and Naturalization Service* v. *Errico*, 385 U.S. 214, on which petitioner seeks to rely, did not delete the "otherwise admissible" restrictions from Section 241(f).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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